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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

REPLY COMMENTS OF THE INTERNATIONAL WAREHOUSE LOGISTICS ASSOCIATION

The International Warehouse Logistics Association ("IWLA") has reviewed the comments submitted by other organizations on the issue of demurrage liability. For its reply to those comments, the IWLA states as follows:

Introduction

Much has been said about why delays sometimes occur in the loading and unloading of rails cars. Shippers, carriers and third-party warehouses have all been identified as parties who can and sometimes do cause those delays. Though not mentioned, it stands to reason that other parties such as brokers and freight forwarders can also cause such delays. Any rules or policy statements issued by the STB should recognize this fact of demurrage liability: no one party is always to blame.

The IWLA agrees with the Association of American Railroads ("AAR") that the long-standing system for handling demurrage liability works well, except for the narrow conflict between *Novolog* and other cases. *See*, AAR Comments at p. 2. Rail carriers may collect their transportation charges including demurrage charges from the consignor or consignee as allowed under the transportation contract. That is, rail carriers have two parties from whom they may collect their transportation charges, the consignor and consignee who have or will become the

beneficial owner of the fright being transported. Rail carriers may not, however, collect their transportation charges from other parties that are not bound by the transportation contract and that have not and will not become beneficial owners of the freight. That is, they may not recover their transportation charges from third-party warehouse, transloaders, stevedores and the like (hereinafter collectively referred to as "3PL warehouses").

3PL warehouses do not escape liability for demurrage charges under this system. To the contrary, IWLA's members face demurrage liability pursuant to their own contracts, which are separate and distinct from the transportation contracts. For a common example, a shipper contracts with a carrier to transport freight to a 3PL warehouse and that same shipper separately contracts with a 3PL warehouse to store and/or handle that freight. If there are delays in unloading the rail cars at destination, the 3PL warehouse is liable for the resulting demurrage charges according to the terms of its contract with the shipper. The 3PL warehouse's liability to the shipper for demurrage charges might or might not mirror the shipper's liability to the carrier for demurrage charges, depending on the terms of the respective contracts. However, the notion that 3PL warehouses somehow escape liability for demurrage charges because they are not liable to carries for those charges is false.

The Conflict Between Novolog and Other Cases Raises a Narrow Issue

The IWLA agrees with the Association of American Railroads ("AAR") that conflict between *Novolog* and other cases is a narrow one that does not require wholesale changes in the system for handling demurrage liability. *See*, AAR Comments at p. 4. The precise issue raised by that conflict is how to handle demurrage liability where a shipper or a shipper's agent erroneously identifies a 3PL warehouse as the consignee on a bill of lading rather than correctly

identifying the 3PL warehouse as an "in care of party" and neither the carrier nor the 3PL warehouse knows of the shipper's error.

Courts have disagreed on this narrow issue. The Seventh Circuit in *South Tec* and the Eleventh Circuit in *Groves* held that the 3PL warehouse was not liable to the carrier for demurrage charges under the transportation contract, which is not to say that the 3PL warehouse was not liable to another party under a different contract. Given these same circumstances, the Third Circuit in *Novolog* held that the 3PL warehouse was liable to the carrier for demurrage charges, not under the transportation contract, but rather under § 10743(a)(1). The IWLA agrees with the Seventh and Eleventh Circuits that a shipper's error in identifying a 3PL warehouse as a consignee, without more, should not make the 3PL warehouse liable to the carrier for demurrage charges. The IWLA respectfully disagrees with the Third Circuit that § 10743(a)(1) imposes any liability for transportation charges, including demurrage charges, on non-consignees like 3PL warehouses.

Carriers Enjoy Adequate Remedies in the Event that Shipper Erroneously Identifies a 3PL Warehouse as the Consignee on a Bill of Lading

Every shipment starts with a bill of lading. A rail carrier must issue a bill of lading for any property received for interstate shipment. *See*, 49 U.S.C. § 11706(a). A bill of lading has three purposes: (1) it records that a carrier has received goods from the party that wishes to ship them; (2) it defines the terms governing the carriage; and (3) it serves as evidence of the contract for carriage. *Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14, 18-19, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004).

Carriers provide the bill of lading form, but carriers rely on shippers to complete those forms. This fact has not changed, although it has become the norm for shippers using Class I

carriers to create bills of lading through the carrier's website or through Electronic Data Interchange ("EDI"). It is the shipper that completes the bill of lading.

The bill of lading has more than one function. Perhaps its most important function for purposes of these proceedings is to identify both the consignor and consignee of the freight. The carrier requires this information in order to know from whom it may collect its transportation charges. *See*, AAR Comments at p. 5.

Another function of the bill of lading is to direct the carrier where to deliver the freight. Shippers often direct carriers to deliver freight to the consignee that has or will become the beneficial owner of the freight. *See*, BNSF Comments at p. 2. At other times, shippers direct carriers to deliver freight to non-consignees, such as 3PL warehouses, that will care for or handle the freight but have not and will not become beneficial owners of the freight. When a shipper directs a carrier to deliver freight to such a non-consignee like a 3PL warehouse, the custom and practice in the industry is for the shipper to identify that party as an "in care of party" on the bill of lading. This information tells the carrier that the "in care of party" is not liable for transportation charges including demurrage charges.

Shippers can and do make mistakes in completing the carrier's bill of lading. The particular shipper's error that is germane to these proceedings is identifying a 3PL warehouse as a consignee rather than an "in care of" party.[1] The issues facing the STB, then, are what to do to about reducing the risk of this particular error and what to do about demurrage liability when this error occurs.

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[1] CSX misplaces the blame for this shipper's error: "When the shipper/consignor incorrectly identifies the warehouse as a consignee (instead of an 'in care of party'), it is the communication link between those two business partners that is failing. Yet it is often the railroad that is left holding the bag for the unpaid demurrage charges." CSX fails to explain how a shipper erroneously completing a carrier's bill of lading form amounts to a miscommunication between the shipper and a 3PL warehouse. *See*, CSX Comments at p. 5.

On the issue of how to prevent shippers from erroneously identifying 3PL warehouses as consignees on the bill of lading, the IWLA submits that this is more a matter for discussion between shippers and carriers. As noted by the Canadian Pacific, "[a]ny requirement that bills of lading (electronic or otherwise) more accurately reflect the *de facto* status of each parties in relation to the others would necessarily have to be imposed on the consignor that prepares the bill of lading . . ." See Comments of Canadian Pacific at p. 24. That said, the IWLA notes that many bills of lading do not clearly distinguish between consignees and "in care of" parties. *See, e.g.*, the Uniform Straight Bill of Lading, 49 C.F.R. § 1035, Appendix A. The IWLA endorses bills of lading, like those used by BNSF, that require the shipper to identify the consignee separately from the "in care of" party. A bill of lading that fails to draw this distinction invites shipper error.

On the issue of what to do about demurrage liability in the event that a shipper erroneously identifies a 3PL warehouse as a consignee rather than an "in care of" party, the IWLA submits that carriers have adequate recourse without making 3PL warehouses liable for those shipper errors. Under the transportation contract, carriers have a claim against the shipper for providing the erroneous information:

> If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made.

See, Uniform Straight Bill of Lading, 49 C.F.R. 1035, Appendix B, Section 7. Additionally, carriers may always recover their transportation charges from the consignee, subject to the terms

of the transportation contract. These are the remedies that carriers have bargained for and that have always fulfilled the legitimate purposes of demurrage.

Carriers Offer No Persuasive Reasons for Expanding Their Remedies in the Event that Shipper Erroneously Identifies a 3PL Warehouse as the Consignee on a Bill of Lading

Not satisfied with their existing remedies, which function well and serve the legitimate purposes of demurrage, carriers seek to make 3PL warehouses responsible for discovering the shipper's error and reporting it to the carrier or become liable for the carrier's demurrage charges. However, none of the reasons offered by the carriers justify making 3PL warehouses liable to carriers for their demurrage charges.

1. Section 10743(a)(1) Does Not Support the Proposition that "In Care Of" Parties Erroneously Identified as Consignees Are Liable for Demurrage Charges.

Several carriers cite § 10743(a)(1) for the proposition that 3PL warehouses owe carriers a duty to discover whether they have been erroneously identified as the consignee and to report that fact to the carrier or become liable for the carrier's demurrage charges. However, this reading of § 10743(a)(1) presupposes that 3PL warehouses are consignees when in fact they are "in care of" parties.

Section 10743(a)(1) must be read in light of the fact that 3PL warehouses are "in care of" parties rather than consignees:

> Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable,

but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—

(A) of the agency and absence of beneficial title; and
(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743(a)(1). This statute allocates liability for a carrier's transportation charges between the consignor and consignee under certain circumstances. It does not extend that liability to parties other than the consignor and consignee. Section 10743(a)(1) does not apply to 3PL warehouses because they are "in care of" parties rather than consignors or consignees. Section 10743(a)(1) does not support the proposition that carriers should be able to recover demurrage charges or any other transportation charges from 3PL warehouses in the event that shippers erroneously identify them as the consignee. Just because a shipper calls an "in care of" party a consignee does not make it so. IWLA respectfully disagrees with the Third Circuit's interpretation of § 10743(a)(1) in *Novolog* because it presupposes that 3PL warehouses are consignees.

2. Blaming 3PL Warehouses for Shippers Erroneously Identifying Them as Consignees on Bills of Lading Would be Impractical and Unfair.

Several carriers commented that the STB should impose a duty on 3PL warehouses to discover whether they have been erroneously identified as the consignee and to report that fact along with the name of the actual consignee to the carrier or become liable for the carrier's demurrage charges. Typical of these is the AAR's comment that carriers "cannot be left guessing as to whether the delivery instructions provided to it by the consignor on the bill of lading correctly [identify] the consignee responsible for demurrage at destination . . ." *See,*

AAR's Comments at p. 6. The IWLA strongly disagrees that its members should face liability for demurrage charges under these circumstances.

While it may be true that carriers are not to blame for shippers erroneously identifying 3PL warehouses as consignees (subject to improvements that might be made in the bill of lading), that hardly justifies blaming 3PL warehouses for those errors. It is the shipper, not the 3PL warehouse and not the carrier, but the shipper that knows the names and status of the "in care of" party and the consignee. It is the shipper that is to blame for errors in completing the bill of lading. *See, e.g.*, BNSF Comments at p. 2 ("The success of any demurrage program requires that the shipper properly reflect the status of the entities involved in the transportation chain . . ."). Carriers already have a remedy against the shipper for providing such erroneous information.

Just because some Class I carriers have sophisticated electronic information systems does not mean that 3PL warehouses should be required to access those systems to confirm whether they have been erroneously identified as the consignee on the bill of lading. If carriers want another set of eyes checking to see whether the shipper has erroneously identified a 3PL warehouse as the consignee on a bill of lading, carriers should that delivers those bills of lading to the 3PL warehouses rather than expecting the 3PL warehouse to search for them. A carrier might not be in a position to confirm whether the shipper has erroneously identified the consignee, but it at least has the ability to forward the bill of lading to the named consignee. *See*, Comments of Canadian Pacific at p. 22. Another problem with requiring 3PL warehouses to go in search of their status on the bill of lading is that the accessibility of that information to 3PL

warehouses is unclear. Notably missing are comments from the 500-plus Class II and III railroads on the accessibility of that information.

Just because a 3PL warehouse knows that it has been erroneously identified as the consignee on a bill of lading does not mean that the 3PL warehouse can identify the actual consignee. Warehouses rarely know or have any reason to know the identity of the actual consignee. They are no different than carriers in this regard.

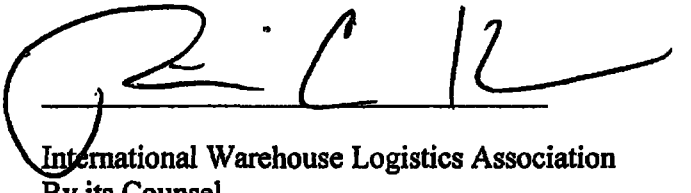
3. Carriers' Unwillingness or Inability to Collect Transportation Charges from Consignors or Consignees Does Not Justify Making 3PL Warehouses Liable for Those Charges

Some carriers claim that they are unwilling or unable to collect their transportation charges from consignors and consignees. As one Class I carrier commented, "it may be more feasible for [Norfolk Southern] to seek to collect demurrage from the shipper/consignor, but [Norfolk Southern] has traditionally been hesitant to seek collection from that party." *See,* Norfolk Southern's Comments at p. 21. While it may be true that carriers are not able to collect their transportation charges in every instance, this does not support the proposition that carriers are entitled to greater remedies than the ones they bargained for in the transportation contract. Carriers may recover their transportation charges, including demurrage charges, from the consignor or consignor according to the terms of their contract. Their inability or disinterest in recovering from those two parties do not justify imposing liability for transportation charges on 3PL warehouses where no such liability otherwise exists.

Conclusion

The long-standing system for handling demurrage liability works well. Carriers may recover their transportation charges, including demurrage charges, from the consignor or the consignee according to the terms of the transportation contract. At the same time, 3PL warehouses and other "in care of" parties face liability for demurrage charges according to the terms of their separate contracts. The IWLA supports the Eleventh Circuit's decision in *Groves* for upholding this system.

Respectfully submitted,



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